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Supreme Court of the United States

OCTOBER TERM 1970

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No. 614

THEODORE W. PARKER, individually and as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

and JOHN VOLPE, individually and as Secretary of Transportation of the United States, WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, STANLEY S. RESOR, individually and as Secretary of the Army of the United States, and WILLIAM F. CASSIDY, individually and as Chief of Engineers, Corps of Engineers of the U. S. Army,

against

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, SIERRA CLUB and the VILLAGE OF TARRYTOWN, NEW YORK,

Respondents.

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Argument	1
Conclusion	9

CASES CITED

Abbott Laboratories v. Gardner, 387 U. S. 136, 141 (1967)	4
Barlow v. Collins, 397 U. S. 159 (1970)	4
Citizens Committee for the Columbia River Sierra Club and Washington State Sportsman Counsel, Inc., et al. v. Stanley S. Resor, et al. (No. 69—498)	6
Citizens Committee for the Hudson Valley v. Volpe, 425 F. 2d 97 (2d Cir. 1970)	7
County of Albany v. Hooker, 204 N. Y. 1, 9 (1920)	5
Data Processing Service v. Camp, 397 U. S. 150 (1970)	4
Ferry v. Udall, 336 F. 2d 706 (9th Cir. 1964), cert. denied 381 U. S. 904 (1965)	4
Flast v. Cohen, 392 U. S. 83 (1968)	4
Hunter v. Pittsburgh, 207 U. S. 161, 178 (1907)	5
Reynolds v. Syms, 377 U. S. 535, 575 (1964)	5
Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967)	2
Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608, 603 (2d Cir. 1968)	2, 4
Sierra Club v. Hickel, No. 24966	2

PAGE

State of Delaware et al. v. Pennsylvania New York Central Transportation Company, et al. (No. 3849—D. Del.) 6

Troutman v. Shriver, 417 F. 2d 171 (1969) 4

United States v. Walker, 409 F. 2d 477 (9th Cir. 1969) 4

Williams v. Eggleston, 170 U. S. 304, 310 (1898) 5

STATUTES

5 U.S.C. § 701(a)(2) 4

N. Y. Const. Art. IX, Sec. 2 5

Rivers and Harbors Act of 1899 §§ 9 and 10 6

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ARGUMENT

Neither the respondents nor the courts below found any language in the relevant statutes or congressional history to support the conclusion that persons such as respondents are aggrieved persons under the Administrative Procedure—

Act. The courts below simply followed *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1968) and *Road Review League* v. *Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967). Actually none of the respondents are aggrieved persons any more than any other person residing in the surrounding area.

This is recognized in the Hart-McGovern bill (S. 3575) which, if enacted, would permit any citizen to maintain an action to protect the environment. See New York Times, October 18, 1970, section 4, p. 6 , discussing this and reporting that the bill was meeting with substantial opposition. The necessity for such legislation undercuts respondents' reference (Br. p. 12) to the National Environmental Policy Act.

The citations by respondents (Br. pp. 23-24) of cases either in the Circuit Court of the District of Columbia or in the District Courts of recent unpublished opinions which are stated to "have expanded the traditional concepts of standing and modified them to permit the assertion by private parties of public or quasi-public rights" is an admission that the expansion is one which should be reviewed by this Court.

This is rendered especially so by the recent opinion in the Ninth Circuit in *Sierra Club* v. *Hickel*, No. 24966, handed down on September 16, 1970, which is in direct conflict with the position of the respondents. There is thus clearly a direct conflct between at least the two circuits.

In that case, the Ninth Circuit held that the Sierra Club, the very same organization which sued in the instant case, did not have standing to challenge the actions of federal officials concerning the development of a commercial and recreational area in and near Mineral King Valley located within Sequoia National Forest in California. The Court there indicated that "such club concern without a showing of more direct interest" cannot constitute standing in the

sense that that concept has been set forth by this Court and the lower courts in recent decisions.

The only alleged basis for standing in that case, which is the exact same basis upon which the Second Circuit upheld standing for the Sierra Club in this case was the fact that the actions of the federal officials "are personally displeasing or distasteful to them." As in the case at bar, the Ninth Circuit found none of the Sierra Club's property will be damaged, neither its organization or its members endangered nor its status threatened.

The Ninth Circuit then held that it diametrically opposed the decision which had been arrived at by the Second Circuit in the instant case:

> "To the extent to which *Citizens Committee for Hudson Valley* v. *Volpe, supra,* indicates that the Sierra Club has standing within the 'private Attorney Generals' rule, we respectfully disagree. We believe that rule is limited as it states to cases where Congress has enacted a statute 'conferring on any non-official person, or on a group of non-official persons, authority to bring a suit' to prevent unauthorized official action. See, *Scanwell Laboratories, Inc.* v. *Shaffer, supra,* 424 F. 2d at 864. We find no indication in any federal statute that Congress has 'conferred' on the Sierra Club or any group like it, authority to bring suits to challenge official action." (p. 12, fn. 9)

In both the Ninth Circuit case and in the Second Circuit case, the Sierra Club made virtually identical allegations as to the alleged aesthetic and conservational injury which would allegedly be imposed upon its members should the proposed project be constructed.

Whether the Sierra Club has standing is intimately entwined with whether the other respondents herein, the local *ad hoc* Committee and the Village of Tarrytown have sufficient standing, since the essence of all their allegations

was that there was an aesthetic and conservational interest which would be endangered by the construction of the Hudson River Expressway.

The essence of petitioner Parker's position is simply that respondents have failed to show that the challenged action has caused injury to them, aesthetic, economic or otherwise and have further failed to demonstrate that the interest sought to be protected by them is within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970).

Unlike *Flast* v. *Cohen*, 392 U. S. 83 (1968), *Data Processing Service* v. *Camp*, *supra*; *Barlow* v. *Collins*, 397 U. S. 159 (1970) and *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 603 (2d Circuit 1968), there is no federal statute or constitutional guarantee conferring on any of the respondents herein the right to bring the instant action.* Furthermore, respondents' brief lends further credence to petitioner Parker's contention that none of the respondents herein have shown sufficient interest, aesthetic, economic or otherwise in the area where the Expressway is to be built in order to uphold standing.

The only indications of the "interest" of the Sierra Club in this area is that representatives of the club appeared at several public hearings in opposition to the Ex-

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* Contrary to the impression held by respondents (Br. pp. 12, 22), we think the Circuit Court misapplied the language in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967), as establishing the jurisdiction to review under the Administrative Procedure Act. We believe the language in the opinion of this Court is to be read as applying only to situations where the aggrieved person is required to act affirmatively which is not the case here. That was the view expressed by the Fifth Circuit in *Troutman* v. *Shriver*, 417 F. 2d 171 (1969). Moreover, the issue here is "agency action . . . committed to agency discretion by law" (5 U.S.C. § 701(a)(2)); *Ferry* v. *Udall*, 336 F. 2d 706 (9th Cir. 1964), cert. denied 381 U. S. 904 (1965); *United States* v. *Walker*, 409 F. 2d 477 (9th Cir. 1969).

pressway. However, no mention is made of any camp sites, nature trails, boat launch sites, or any activities which the Sierra Club has ever engaged in along the eastern shore of the Hudson River between the Village of Tarrytown and the Village of Crotonville, New York. The most that respondent Sierra Club claims is that the Sierra Club intervened before the Federal Power Commission in opposition to the Storm King Mountain project in Cornwall, New York. However, this project is on the other side of the Hudson River, at least 15 miles upstream from the area presently under dispute. Merely because the Sierra Club has shown its concern in one limited project along the Hudson River does not give it the right to claim the entire river within its domain for the purpose of bringing any lawsuit it desires.

Similarly, the local Citizens Committee has done nothing in the area of the proposed Expressway in the way of conservation or aesthetic activities, but has existed merely to lobby against the proposed Expressway. The fact that the committee may have expressed its concern in other conservation activities, which allegation was never proved and is open to serious dispute, does not give it sufficient interest to intervene in this particular dispute.

Finally, the brief of the respondents does little to enhance the alleged standing of the Village of Tarrytown. There is no doubt that under New York Law a village lacks standing to assail the validity of proposed State action. In fact, in *County of Albany* v. *Hooker*, 204 N. Y. 1, 9 (1920), New York's highest court held that a subdivision of the State may not attack a decision of the State to construct a new road in the vicinity. The theory behind this case, as well as all others which have followed it is that since a local government is a creature of the State, N. Y. Const. Art. IX, Sec. 2, it has only such powers as the State may give it. *Reynolds* v. *Syms*, 377 U. S. 535, 575 (1964); *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178 (1907); *Williams* v. *Eggleston*, 170 U. S. 304, 310 (1898). Furthermore, the fact that there is an urban renewal area in the

Village of Tarrytown does not sustain standing since uncontroverted proof at the trial showed that title to this area has now vested in the State Urban Renewal Agency. Finally, there is no support for the village's statement that it would lose tax revenues due to construction of the Expressway. Even if this were so, no New York case has gone so far as to warrant standing on this ground alone.

Turning briefly to the issue of the dikes and causeways, it is imperative that this Court give its interpretation of §§ 9 and 10 of the Rivers and Harbors Act of 1899. Until the instant lawsuit, there was no question that the Corps of Engineers had authority to grant permits to fill and place bulkheads protected by dikes in navigable waters in the United States without congressional consent. The reason this practice had not been challenged was not as petitioners suggest that parties lacked standing for such challenge, but that it was patently obvious to any individual that it would be absurd for Congress to pass upon such reclamation projects wherever the word "dike" appears. However, the erroneous decision of the Court below has already engendered at least two other cases which intend to seize upon the same erroneous determination of the presence of a Section 9 "dike" made by the Second Circuit in the instant case.

In *Citizens Commitee for the Columbia River Sierra Club and Washington State Sportsman Counsel, Inc., et al.* v. *Stanley S. Resor, et al.* (No. 69-498) (D. Ore.), plaintiffs are challenging the proposed extension of runways at the Portland Oregon Airport, claiming that dikes and a causeway are involved, requiring congressional approval. In *State of Delaware et al.* v. *Pennsylvania New York Central Transportation Company et al.* (No. 3849—D. Del.), an action has been commenced seeking to enjoin the Penn Central Railroad from filling an embankment along the shore of the Delaware River, on the ground that "dikes" are involved, requiring Congressional approval. The sole support upon which plaintiffs rely in both these cases is *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97 (2d Cir. 1970).

These two cases are only the first of a plethora which are likely to follow unless this Court gives a definitive answer as to whether Congressional consent is necessary before the type of "dike" or retaining wall being built in conjunction with the Hudson River Expressway and numerous other public works projects. As explained in the petition, to require such Congressional approval would be illogical and ill-advised.

Finally, it should be noted that in the case presently pending in the District Court of Delaware, there is on file a sworn affidavit by James E. DeSista, the Chief of the Miscellaneous Civil Branch, Operations Division, Directorate of Civil Works in the Office, Chief of Engineers, Department of the Army, the individual having responsibility for supervising the program for the issuance of permits as contemplated and authorized by Sections 9 and 10 of the Rivers and Harbors Act of 1899. In such affidavit, DeSista describes the issuance of over 30 § 10 permits containing the word "dike" which have been issued without Congressional consent over the past 50 years in the Delaware and Schuylkill rivers alone. The affidavit then goes on to reflect the national application of the long standing administrative practice of the Corps of Engineers in issuing bulkhead and fill operations protected by "dikes" in major public works projects throughout the United States under the authority of § 10 and without Congressional approval;

Date Permit Issued	*Place*	*Waterway*	*Nature of Improvement*
13 January 1931	Boston, Mass.	Charles River	Creation of recreation area by filling 125 to 300 feet inton river.
14 August 1962	Shelton, Ct.	Housatonic River	Highway embankment for 2,250 feet along river.
30 August 1937	New York, N. Y.	East River	La Guardia Airport runways 9,000 feet long.